No. 13-20-00143-CV

In the Thirteenth Court of Appeals in
Corpus Christi - Edinburg

DIANA GARZA, *Appellant*
V.
JOSE OCHOA, *Appellee*

ON APPEAL FROM CAUSE NO. 18-417-D
105TH Judicial DISTRICT COURT OF Kleberg COUNTY, TEXAS
HON. Jack W. Pulcher, Presiding Judge

AMENDED RESPONSE BRIEF OF APPELLEE JOSE OCHOA

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ORAL ARGUMENT IS REQUESTED

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REQUEST FOR ORAL ARGUMENT

Jose Ochoa respectfully requests oral argument because Appellant has requested oral argument.

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Appellee,	§	**CORPUS CHRISTI, TEXAS**

AMENDED RESPONSE BRIEF OF APPELLEE JOSE OCHOA

TO THE HONORABLE THIRTEENTH COURT OF APPEALS:

COMES NOW Jose Ochoa and files this Amended Brief in Response to Appellant's Brief filed on June 22, 2020 and would show this Honorable Court of Appeals that the trial court acted in accordance with Texas law, and that the underlying judgment should be affirmed in all things.

I.
INTRODUCTION/STATEMENT OF THE CASE

Appellant Diana Garza (hereinafter Appellant Garza) complains that Appellee Ochoa's summary judgment motion was mistakenly granted, because she contends that there is a common law duty throughout Texas to restrain domestic animals, including dogs. Appellant claims to have lost control of her automobile when a dog, purportedly owned by Appellee, ran in front of her resulting in a non-contact accident. Appellant has tried to find a duty and to identify fact issues to defeat the summary judgment granted in favor of Appellee Jose Ochoa by Judge

Pulcher of the 105th District Court of Kleberg County. In addition, she contends that evidentiary objections filed by Appellee Ochoa in the trial court have been waived.

Appellee agrees that there are issues of fact in this matter that have not been resolved, but they do not matter to the outcome of this case. Appellee Ochoa made no argument based on failure to prove ownership of the dog alleged to have caused the accident or on whether it was a dog at all that caused Appellant to lose control of her vehicle (the police report shows that Appellant was not even sure it was a dog, let alone which dog, that caused her to veer at the time of the accident). Thus, whether the dog was owned by Appellee Ochoa, and whether the dog identified (regardless of ownership) was the cause of Appellant Garza veering off the road, are disputed facts but those facts are immaterial to this appeal. The real issue is whether there was a duty, under the circumstances presented, to restrain the dog.

II.
WHY THE TRIAL COURT WAS CORRECT AND APPELLANT IS WRONG

Appellant Garza basically makes the following arguments in his point of error that the summary judgment should not have been granted:

A. There is a common law duty throughout Texas to restrain dogs (Sections I. B. and C. of Appellant Garza's Brief [hereinafter Appellant's Brief], pp. 18-30);

B. If there is no such common law duty, then this Court should create a Texas-wide duty of dog restraint. (Section I.D of Appellant's Brief, pp. 31-35);

C. Ochoa breached a duty to keep a dog from running loose (Section I.E. of Appellant's Brief, pp. 35-36).

In addition, as subsidiary issues, Appellant also contends:

D. That Appellee Ochoa has waived all the objections to the Caldera declaration and, it is not conclusory (Sections I.F., I.G., and I.H. of Appellant's Brief, pp. 36-41); and

E. This dog was "breachy" as referenced in the stock laws and should have been restrained, thus, the stock laws do not support Appellee's position. (Sections II. and III. of Appellant's Brief, pp. 41-44.)

The trial court correctly granted the motion for summary judgment because:

A. There is no Texas common law requiring restraint of a non-vicious dog. (In Response to Sections I. B. and I.C. and Sections II. and III. of Appellant's Brief) (and in Response to A. above);

B. This court should not create such a duty (In Response to Section I. D. of Appellant's Brief) (and in Response to B. above) in the face of the legislature and the County of Kleberg refusing to do so;

C. If there is no duty, there is no breach of a duty (In Response to Section I.E. of Appellant's Brief) (and in Response to C. above);

D. The Caldera declaration contains inadmissible statements, but they are immaterial and do not mandate reversal (In response to Sections I. F., G., and H. of Appellant's Brief) (and in Response to D. above); and

E. There is no evidence that this dog was "breachy" and the stock laws support the judgment by analogy (in Response to Sections II. and III. of Appellant's Brief, pp.41-44) (and in Response to E. above).

In essence, the propriety of the judgment in this matter boils down to whether in Kleberg County, a dog owner has a duty to restrain a non-vicious dog. Ownership of the dog has been denied, but for the purposes of the judgment below and this appeal, Appellees do not put forth arguments against ownership in this appeal (only).

III.
STATEMENT OF FACTS

Plaintiff alleges that Ms. Diana Garza (Appellant or Appellant Garza) was driving on West FM 772 in Kingsville, Texas on October 4, 2016. Clerk Record, 4 (hereinafter CR). She claims that a dog owned by Appellee Jose Ochoa (Appellee Ochoa or Appellee) ran into the street and caused her to lose control of her vehicle, resulting in a one car accident. *Id.* Although at the time of the accident she did not even know if an animal had run in front of her, she has since decided that the cause of her loss of control was Appellee Ochoa's dog. For the purposes of the motion and its appeal only, Appellee Ochoa is not attempting to prove conclusively or as a matter of law that the dog is not his. Instead, Appellee contends that Appellant cannot prove that there was any legal duty for a dog owner to restrain a dog from running free where this accident happened. As a matter of law there is not, and should not be, one. CR. 12-18, 30-45.

IV.
SUMMARY OF ARGUMENT

There is no Texas-wide duty to restrain a non-aggressive dog in Texas due to the Free Range history of the state. The Texas Constitution acknowledged Texas as a Free Range state due to the importance of cattle, but provided for the state legislature to change that when necessary. The legislature, in turn, as in its handling of free roaming cattle, delegated to local governments the right to determine if limits were needed on the free roaming of domestic animals, such as dogs. The common law of Texas places the duty upon the non-animal owner to protect itself from the animals that may be roaming the countryside, and in places in Texas, like Kleberg County, this is still the law.

This Court should not create such a duty. It would do violence to the legal structure currently in place. The legislature considered changes to the legality of free roaming animals and it delegated that authority to local governments. The citizens of the County of Kleberg have not seen fit to have an election to change the free range tradition of their county as to dogs. Kleberg County citizens were given that choice. This court should not now interfere with the choice they made. That choice was in effect at the time of this accident, so there was thus no common law duty to restrain a non-aggressive dog.

Without a duty, there can be no breach of a duty, so there is no evidence of a duty or a breach.

Appellant also objected to an affidavit provided by a witness in this matter. The conclusory objections, though neither sustained nor overruled, are not waived because they are substantive objections. However, whether waived or not, they really do not affect the outcome of this case, because this case is about whether in rural Kleberg County there is a duty to restrain a non-aggressive dog who harms nobody through viciousness or aggression.

Finally, the identified dog was not "breachy" because it did not break down barriers (or break into a property). The stock laws and dog laws are similar in that the Texas common law places no duty on an owner to restrain dogs or livestock. The legislature has assigned that duty to local governments to make that change. Kleberg County has not elected to pass restraint laws on dogs, so in rural Kleberg County, there is no duty for a dog-owner to restrain a non-aggressive, non-vicious, non-breachy or fence breaking dog. Thus, Appellee Ochoa had no duty to restrain the dog that Appellant claims was Appellee's dog at the time of this accident.

IV.
ARGUMENT AND AUTHORITIES

A. There is No Texas Common Law Requiring Restraint of a Non-Vicious Dog. (In Response to Sections I. B. and I. C. and Sections II. and III. of Appellant's Brief)

Appellant Garza contends that between general negligence law as enunciated in *El Chico v. Poole,* 732 S.W.2d 306 (Tex. 1987) (superseded by statute) and references to the Restatement (Second) of Torts in *Marshall v. Ranne*, 511 S.W.2d

255, 258 (Tex. 1974), there is a general duty on the part of all Texans to take reasonable steps to keep others safe. Appellant would include in this duty the restraint of domestic animals, such as dogs, which are neither aggressive nor vicious. Appellant, however, can point to nothing that sets forth a common law duty placed on a Kleberg County owner of a domestic animal to prevent it from roaming. *See* Section V.A.4. and 5., below.

1. The Summary Judgment Should be Affirmed as to Negligence Per Se Claims

Appellant, initially, also included negligence per se in her complaint, alleging that Appellee violated a Kingsville ordinance requiring some restraint of dogs. (CR.5). Appellant acknowledged that the ordinance did not apply and that Appellee did not violate that ordinance. Appellant's Brief, p. 18. Thus, the summary judgment should be affirmed as to the negligence per se allegations, at least. Otherwise, if necessary, Appellee asserts that this argument should be considered waived as it has not been designated or briefed on appeal. *Fed. Sign v. Texas S. Univ.,* 951 S.W.2d 401, 410, 40 Tex. Sup. J. 676 (Tex. 1997).

2. Free Range is a Texas Tradition

Just thirty (30) years after statehood, the Texas Constitution of 1876 recognized the free range traditions of Texas, but provided the legislature with authority to limit the "Free-Range" rule, as needed. Tex. Const. Art. XVI §23. The Constitution also authorized the legislature to regulate fencing **throughout the**

state. Tex. Const. Art. XVI, §22, (repealed 2001). It was thus recognized that the starting point in Texas law regarding domestic animals is that they were free to roam. Texas leaders, however, recognized that under some circumstances, limitations on roaming domestic animals might be appropriate, and the Texas legislature should determine when.

Texas had rejected the English law that required restraint of domestic animals, as explained by the Texas state supreme court in 1893:

> Neither the courts nor the legislature of this state have ever recognized the rule of the common law of England which requires every man to restrain his cattle either by tethering or by inclosure...It is the right of every owner of domestic animals in this state, not known to be diseased, vicious, or "breachy," to allow them to run at large....

Clarendon Land Inv. & Agency Co. v. McClelland Bros, 86 Tex. 179, 23 S.W. 576, 577-578 (Tex. 1893). One hundred years later, the supreme court reaffirmed that message and rule of law in *Gibbs v. Jackson*, 990 S.W.2d 745, 747 (Tex. 1998), *citing McClelland*, 23 S.W.576, 577-578. Although *Gibbs* is now 20 years old, the supreme court in *Pruski v. Garcia*, 594 S.W.3d 322, 323 (Tex. 2020) reaffirmed that domestic animals may roam freely, when not otherwise constrained by the legislature or regulatory or municipal law.

Although *Pruski, Gibbs* and *McClelland* specifically deal with livestock, the supreme court has recognized that the "free range" rule applies to "domestic animals," including dogs:

> The owner of a dog may, as a general rule, permit him with impunity to run at large, but if he knows him to be vicious and does not restrain him, he is liable for any injury he may inflict upon person or property; and it would seem that the same principle should apply to the owner of any domestic animal known to him as being accustomed to break through an ordinarily good and sufficient fence.

McClelland, 23 S.W. 576, 577. Dogs traditionally, and now, may run free when not constrained by statute or ordinance, without liability for their mere roaming.

3. Legislative Actions Regarding Free Roaming Animals

The Texas legislature, with authority from the state constitution, has passed several laws related to livestock such as those now codified in Chapter 143 of the Agriculture Code. These laws alter the Texas common law related to specifically listed livestock, requiring owners to restrain that livestock to prevent it from roaming freely on federal or state highways (FM roads, like the one involved in this matter are not U.S. or state highways. Tex. Agric. Code §143.101.) The legislature also passed laws allowing local governments to adopt stock laws, through a local election, to require restraint of livestock within a county. *E.g.,* Tex. Agric. Code §§143.021, 143.074.

But the legislature has passed other laws related to dogs. Some such laws relate to rabies control and some relate to the prohibition of cruelty to domestic animals, including dogs. Tex. Health & Safety Code, Chapters 821, 826. Although these laws regulate dogs, they relate primarily to the care and health of the dogs. They do not require restraint.

Legislation touching on the restraint of dogs also exists. Per Tex. Health & Safety Code §822.011 et seq., dogs that attack persons and animals are not allowed to roam freely. Tex. Health & Safety Code §§822.005, 822.011. However, the legislature chose to allow localities to opt to decide between free-roaming non-vicious dogs, or requiring restraints on all dogs. To that end, the legislature delegated to localities the right and obligation to determine if dogs within their jurisdictions should be restrained. *E.g.,* Tex. Health & Safety Code §§822.007, 822.021, 822.031.

As a consequence, there is no state-wide law that requires non-aggressive dogs to be restrained in Texas. There is no case law that has altered the common law of Texas as a whole, and there is no dog restraint law applicable to rural Kleberg County where this accident occurred (CR. 38-42) (*See also* Appellant's Brief at p. 18: "It has since been determined that Ochoa's property was outside of the city limits, so negligence per se cannot apply.") The legislature left intact the common law of Texas as a Free Range state (for dogs and cattle) and imposed no duty on a dog owner in a rural area to restrict a dog's movements. Since there is no evidence of a local election instituting laws to restrain dogs, there is simply no law creating such a duty in Kleberg County.

The only complaint about this dog is that it allegedly ran in front of Appellant's car. It is a complaint about the location of the dog. There is no

allegation or evidence that it was vicious, aggressive, or diseased. And it is only on this appeal that Appellant now argues that the dog is "breachy," but that argument is defeated at Section V. E. below. Since it is not an aggressive or vicious dog, the "owner" violated no duty allowing it to roam free.

4. Texas Case Law Confirms a Free Range Texas

The Texas supreme court has continuously acknowledged the free range tradition of Texas. From the Texas Constitution of 1876 to the most recent *Pruski* decision, the courts of Texas have respected the free range way of life. Texas courts, through *McClelland*, and *Gibbs*, and now *Pruski*, have continued to leave the adoption of limitations on the free roaming of animals to local populations, where the legislature placed it.

In 2000, the Austin Court of Civil Appeals, addressed essentially the same question presented to this court and found that the common law of the state of Texas did not allow a cause of action against the owner of a non-violent, non-vicious, non-malicious non fence-breaking (non-"breachy") animal, for allowing it to wander if there are no laws or regulations restricting such wandering. *Hayes v. Blake*, 2000 Tex. App. LEXIS 4928, 2000 WL 1028206 (Tex. App.—Austin 2000, no pet.)(not designated for publication).

An Austin city ordinance required that dogs be restrained by leash or otherwise. Eighty-five-year-old Ms. Hayes was walking in an area that had been

annexed by Austin for limited purposes. Two dogs of a nearby landowner had dug under their fence and one of the dogs approached the woman playfully. There was no dispute that *the dog only sought to play.* The dog jumped up on the woman, knocking her down and causing hip injuries from the fall.

Ms. Hayes sued the dog owner for violating the Austin City ordinance regarding dog restraints. (Ochoa was also initially sued for violating an ordinance that did not apply.) Hayes also alleged common law negligence. Cross-motions for summary judgment were filed with the dog-owning Blakes taking the position that their dog had no violent propensities, so they had no duty to restrain or warn about it. They also contended that the city ordinance imposed no duty because of the limited nature of the annexation. The court determined that the annexation of the neighborhood where the accident happened was limited to the purposes of planning, zoning, sanitation, and health protection. The city specifically stated that no additional services would be provided. The court determined that the leash law was not a sanitation or health law, so it did not apply to the annexed area. Thus, the Blakes were not negligent per se. *Id.*

In addressing common law negligence, the court paid homage to the supreme court's previous affirmation of free ranges in Texas:

> Absent a duty imposed by a statute, there is no common law duty to restrain an animal that has not exhibited violent or vicious tendencies. In Texas "it is the right of every owner of domestic animals in this state, not known to be diseased, vicious, or breachy

> to allow them to run at large, and this without reference to the size or class of such animals kept by others in the same neighborhood. *Gibbs v. Jackson*, 990 S.W.2d 745, 747 (Tex. 1999) [*quoting Clarendon Land Inv. & Agency Co. v. McClelland*, 86 Tex. 179, 23 S.W. 576, 578 (Tex. 1893)].

Hayes v. Blake, 2000 Tex. App. LEXIS 4928 at p. *12. This reasoning has been confirmed by *Pruski*, 594 S.W.3d 322 (Tex. 2020).

5. Cases Cited by Appellant Require No Restraint on a Non-Aggressive Dog

Appellant relies on *Ogden v. Estate of Pettus,* 1998 Tex. App. LEXIS 6904, 1998 WL 766766 (Tex. App.—Austin 1998, no writ) (memorandum op.) and similar cases to argue that the duty to handle a dog is not limited to controlling the vicious or dangerous tendencies of a dog. (See Appellant's Brief, p. 21). However, that case and all other cases cited by Appellant Garza describe a duty that, at most, requires an owner to protect against attacks or the viciousness of a dog. *Ogden* involves a dog that *attacked* a child and father who were riding on a bicycle. Thus, it supports the limitation of that duty to guarding against the propensity of a domestic animal to become more dangerous under certain circumstances. *Searcy v. Brown*, 607 S. W. 2d 937 (Tex. App.--Houston [1st Dist.] 1980, no writ) involved an interpretation of a city ordinance (there is no such ordinance here) and found summary judgment properly granted in favor of a dog-owner when the *attack* occurred on the owner's own property. Again, the control of the dog was at issue, but only because the dog behaved aggressively or viciously.

Dunnings v. Castro, 881 S.W. 2d 559 (Tex. App.--Houston [1st Dist.] 1994, writ dism'd) involves a dog that did not actually bite a mailman, but which lunged at the mailman in what was described as an "*attack*". *Dunnings* also relies on the Restatement (Second) of Torts, §518, which is frequently cited in dog bite cases. *Dunnings* includes the explanation for the "dog-handling" duty, which limits it to aggressive and vicious tendencies in dogs (whether the dog is aggressive or vicious generally or not), and keeps it from conflicting with free range Texas common law, unless specifically limited by local election. After setting forth the potential liability for handling an animal, that is not abnormally dangerous, the *Dunnings* court continues:

> [The owner] is therefore required to realize that even ordinary gentle animals are likely to be dangerous under particular circumstances and to exercise reasonable care to prevent foreseeable harm.... So, too, the keeper of an ordinary gentle bitch or cat is required to know that while caring for her puppies or kittens she is likely to attack other animals and human beings.

Dunnings, 881 S.W.2d 559, 562, citing Restatement (Second) of Torts 518(h) (emphasis added). This section is entitled "Animals Dangerous under particular Circumstances."

Thus, the purpose of the "dog-handling" duty is to guard against non-vicious dogs becoming aggressive under certain circumstances. Both *Dunnings* and *Searcy* acknowledge that an

> owner of a domestic animal is not liable for injuries caused by it in a place where it has a right to be unless the animal

> is of known vicious propensities or the owner should know of the vicious or unruly nature of the animal.

Dunnings, 881 S.W.2d 559, 563; *Searcy*, 607 S.W.2d 937, 941. The goal is to protect others from viciousness.

The dog in *Allen v. Albin*, 97 S.W.3d 655 (Tex. App.—Waco 2002, no pet.) *attacked* a child through a chain link fence separating a private residence from a childcare facility. *Osburn v. Baker* 2020 Tex. App. LEXIS 3916 (Tex. App.—San Antonio 2020, no pet.) involved a *dog bite* from a dog *attack* while on the dog owner's property, but there was a fact question as to whether there was knowledge of dangerous propensities. Yet, in this Kleberg County case, there is no contention that the dog made any aggressive move, and there is no evidence to support a vicious move by a dog.

Appellant also cites to some livestock cases that refer to "common law" negligence involving cattle: *Weaver v. Brink*, 613 S.W.2d 581 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.); *Warren v. Davis*, 539 S.W.2d 907 (Tex. Civ. App.—Corpus Christi 1976, no writ) and *Fuller v. Graham*, 2000 Tex. App. LEXIS 8610, 2000 WL 34410006 (Tex. App.—Corpus Christi 2000, no pet.) (not designated for publication). Each of these cases involved an exception to the Free Range rule. *Warren* occurred in a county that had passed stock laws, allowing a citizen to sue for failure to take appropriate actions to restrain the bull that got out. *Weaver* and

Fuller involved animals on state or federal highways. The state legislature required livestock owners to keep them off state and federal highways by passing Tex. Agric. Code § 143.102. None of these cases represent an application of a general rule of negligence requiring the restraint of a non-vicious, non-aggressive domestic animal unless:

1. A statute has been passed by the legislature allowing an injured party to sue for damages resulting from a free roaming animal, or
2. A locality has opted to impose such restrictions by ordinance or regulation.

Neither had occurred for rural Kleberg County for the time of the accident.

6. No Law of Any Kind Supports a Texas-Wide Duty to Restrain all Dogs

All of Appellant's dog cases focus on the tendencies of a dog to be aggressive or dangerous or to attack under certain circumstances. None of them relate to a dog that is just roaming around, non-aggressively and without viciousness. Thus, none of the cases upon which Appellant Garza relies are apposite to whether there is a common law duty to restrain a non-vicious, non-fence-breaking, non-aggressive dog. The dog was where it had a right to be under the free-range laws of Texas. Therefore, there is and was no duty.

Finally, Appellant contends that there is no difference between a dog that causes damage by being in the road (not a US or state highway) and one that

attacks. However, just as there is a difference in the duty of a domestic animal owner depending on where the animal may be (for example, whether the county has passed a stock law or not), there is also a difference between the duty owed to handle an animal that in no way acts aggressively or viciously and an animal that behaves aggressively or viciously. *See, e.g., Pruski*, 594 S.W.3d 322, 329 (details matter and lines must be drawn). Texas tradition and common law has many such distinctions. Lines have to be drawn and the legislature has drawn this line in favor of the free-range policy for non-aggressive dogs, unless a local government takes action to the contrary. Without such an election, a dog-owner in a county like Kleberg County has no duty to restrain a non-aggressive dog.

B. This Court Should Not Create Such a Duty (In Response to Section I. D. of Appellant's Brief), in the Face of the Legislature and the County of Kleberg Refusing To Do So.

Creation of the duty sought by Appellant Garza would be a complete rejection of Texas' proud free range history which is recognized in the state Constitution at Article XVI, §23 and current case law. Even this year, that free range tradition was acknowledged, except as limited by stock laws, other statutes, regulations, and ordinances, which like the dog laws must be put to a local election. *Pruski*, 594 S.W. 3d 322; Tex. Health & Safety Code §§822.007, 822.021. Evidence of such an election is completely absent from this case.

Garza wants to take Kleberg County's right to choose away and impose a duty on all county residents to restrain non-vicious pets. The creation of a duty is not lightly taken and requires a complex analysis. In determining whether a Defendant was under a duty, courts will consider several interrelated factors, including the risk, the foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury and the consequences of placing the burden of guarding against the injury on the defendant. *Pride v. Collin Park Marina, Inc.*, 2001 Tex. App. LEXIS 4557, 2001 WL 755907 (Tex. App.—Dallas 2001, pet. denied) (not designated for publication). *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990).

There is little to no evidence to support the creation of a duty. Although Appellant Garza assumes that the foreseeability of this accident is high, Appellant Garza has actually established that it was not high at all, by her own evidence. She produced two declarations (from Appellant Garza and witness Teresa Caldera) which may or may not be good summary judgment evidence. Although witness Caldera professes to have "gone walking every night" and "would walk by Jose Ochoa's house" (how often is not stated); and that dogs "would run from his house, up his driveway, and out to the road every time [she] walked or drove by," (CR. 28). Caldera failed to establish any prior accident involving the dog or dogs she

describes. Instead, she establishes that the dogs' behavior has been inconsequential, for at least the period of time described in her declaration.

Further, Appellant Garza has established no foreseeability of serious injury from a driver who was startled by the dogs and lost control of a car. In fact, there is apparently no history of hitting a dog or of a dog startling a driver to cause her to lose control of her car. While the dogs may run along the road or on Mr. Ochoa's property, the declaration, while stating that the dogs run to the road, does not even say they ran into the road. (Nor does the declaration of Ms. Garza, although it does say the dog ran in front of her—she does not say that she was on the road, however.) (CR. 26). Yet, there is no indication in the "years leading up to Appellant Diana Garza's car accident" of prior injury or even a close call.

No evidence was presented as to what would be required, the cost to the Appellee, or the benefit to the Appellant. Appellant has made bald assertions, but she has provided no such evidence at the trial level. There is no evidence of how costly a fence would be in Kleberg County, and/or what type of restraint would be required.

Regardless of the cost to Appellee Ochoa, individually, the cost to the right of local self-determination would suffer a substantial blow. As previously explained, Texas was founded on free range principles. The legislature allowed each locality to determine whether to place the duty on the landowner or on the

owner of a dog. Kleberg County has chosen to leave that duty upon the non-animal owners. Allowing judicial imposition of the duty sought by Appellant would take away the right of the citizens of Kleberg County to make the decision, invalidating legislative delegation. The cost to the legal system would be immense.

Appellant Garza has not cited a single case or statute or regulation that is applicable in which Texas has recognized a duty of a dog owner to restrain a non-vicious, non-destructive dog. There are, however, statutes that require drivers to control their speed and to keep a proper look out. Tex. Transp. Code §§545.351, 545.417. But there are none that require restraint of dogs under these circumstances. There are statutes allowing localities to adopt those rules, which Kleberg County has not done. And there is a history in this state of free range rural land and roaming domestic animals, except as restricted by statute or regulation. Garza is asking, based on this one accident, to change the tradition and way of life recognized by the Texas constitution, the legislature and the supreme court.

If any court should create the duty, the Austin Court of Appeals has suggested it should be only the Supreme Court. *Bernard Johnson, Inc. v. Continental Constructors, Inc.,* 630 S.W.2d 365, 375 (Tex. App.—Austin 1982, writ ref'd n.r.e..) However, under the particular circumstances of this matter, even a supreme court change could do violence to Texas jurisprudence. Given the constitution's and legislature's recognition of roaming domestic animals as the

common law, it is questionable at best, whether a Texas court has the authority to impose a pan-Texas duty to restrain non-aggressive dogs, in contravention of the legislative enactments giving that choice to localities. *See* Tex. Health & Safety Code §§822.007; 822.021.

Furthermore, this Court of Appeals has previously been faced with the issue of whether a duty should be created with regard to roaming domesticated animals. In 1998, a truck driver who had hit calves in the roadway argued that the standard for recovering against the owner should be laxer, i.e., that the calf-owner should have a duty to restrain the calf. This court responded that it looked to the legislature to make such changes if necessary. *Straitway Transp., Inc. v. Mundorf*, 6 S.W.3d 734, 741 (Tex. App.—Corpus Christi 1999, pet. denied), *citing Beck v. Sheppard*, 566 S.W.2d 569, 572-73 (Tex. 1978). *See also McNeal v. Thomas*, 2005 Tex. App. LEXIS 1338; 2005 WL 375482, (Tex. App.—Corpus Christi 2005, no pet.) (Memorandum Opinion on Rehearing) (No duty to warn of livestock on the road.) This standard has again been re-affirmed this year. *Pruski*, 594 S.W.3d 322.

The legislature has spoken to the issue and declined to put into place such a duty across all of Texas. The courts should not do what the legislature has refused to do. *E.g., Benge v. Williams*, 472 S.W.3d. 684 (Tex. App.—Houston [14th Dist.] 2014) *aff'd* 548 S.W.3d 466 (Tex. 2018). And the courts should not take this choice from the hands of the voters in which it was placed.

Appellant Garza requests this court to ignore a century of tradition and practice in Texas of allowing animals free range and requiring those who traverse FM roads to beware of domesticated (not to mention, wild) animals. She further asks this court to ignore legislative action in the form of Tex. Health & Safety Code §§822.007; 822.021, which give the choice to the counties and cities of Texas to determine by election if dogs need to be restrained. In essence, she asks this court, by judicial fiat, to enforce on the citizens of Kleberg County a restraint that neither the Texas legislature, nor the people of Kleberg County, have chosen to adopt. The court should therefore decline to create a general pan-Texas dog-restraint duty and affirm the trial court judgment.

C. If There is No Duty, There is No Breach of a Duty (In Response to Section I.E. of Appellant's Brief)

Because Appellee Ochoa had no duty to Appellant Garza, and the imposition of such a duty would be such a monumental change to Texas law, Appellee cannot have breached a duty to Appellant Garza. *Wilson v. Duever*, 373 S.W.2d 339, 345 (Tex. Civ. App.—San Antonio 1963, writ ref'd, n.r.e.). A duty is a prerequisite to such a breach. *Firestone Steel Prods. Co. v. Barajas*, 927 S.W.2d 608, 613 (Tex. 1996). Without a duty of a breach of a duty, the judgment should be in all things affirmed.

D. The Caldera Declaration Contains Inadmissible Statements, But They are Immaterial and Do Not Mandate Reversal. (In response to Sections I. F., G., and H. of Appellant's Brief)

Appellant Garza has contended that objections to the declaration of Teresa Caldera have been waived due to the failure to obtain a ruling on them. In the overall scheme of things, these objections are most likely immaterial to this matter, because if there is no duty, then there is no liability. These objections are only material if they "affect[] the outcome of the suit under the governing law." *W. Trinity Props., Ltd. v. Chase Manhattan Mortg. Corp.*, 92 S.W.3d 866, 869 (Tex. App.—Texarkana 2002, no pet.) In this case they are not material, because there is no duty.

Even Appellant recognizes that at least some of the statements are not particularly important to the record. (Appellant's Brief, p. 41) Ms. Caldera describes the dog as "a constant nuisance in the neighborhood." She is concluding for the neighborhood that the dog is nuisance, although she has only described it running to the road. The conclusion that she has drawn lacks sufficient supporting facts to render it other than a conclusion. However, as Appellant concedes, such a characterization is not relevant. Without a duty, even assuming Appellant's conclusions are true, they change nothing.

However, the objections to conclusory statements in the Caldera declaration, are good objections. In the event that these objections appear material to the court,

Appellee, contends that they were good objections. Objections to conclusory statements are substantive objections to the evidence. *Grynberg v. M-I L.L.C.,* 398 S.W.3d 864, 874 (Tex. App.—Corpus Christi-Edinburg 2012, pet. denied) As such, they can be made for the first time on appeal. *Id.*

Caldera does not state how often she walked by Ochoa's house. She does not state how she knows that the dogs ran up to "pretty much everyone that walked or drove by and was a constant nuisance in the neighborhood." (Ms. Caldera lived half a mile away). CR. 32, 34. Finally, she said that she saw the dog on Ochoa's property. She apparently jumps to the conclusion that Appellee owns the dog, although there was apparently more than one dog and nothing to prevent neighbor or stray dogs from wandering onto the property of Appellee Ochoa. Thus, the statement of ownership is a conclusion, rather than a statement of facts. Because these are objections that are substantive, have not been waived, and are valid and good objections, they may be considered by this court. *Id.* They have not been waived. *Brown v. Brown*, 145 S.W.3d 745, 751 (Tex. App.--Dallas 2004, pet. denied).

E. There is No Evidence that this Dog was "Breachy" and the Stock Laws Support the Judgment by Analogy (In Response to Sections II. And III. Of Appellant's Brief)

Appellant is correct that the "stock" laws do not apply to dogs. The list of animals covered by the stock laws include cattle, horses, fowl, work animals such

as donkeys or mules, but do not specifically mention animals such as dogs or cats. *E.g.*, Tex. Agric. Code §143.021, 143.074. However, the stock laws are the means by which the legislature, pursuant to its authority from the Texas Constitution, can and has placed restraints on many domestic animals in Texas, as a modification of the free range system historically in place in the state. Although that system has been modified, it basically remains the law of this state unless altered by a statute or ordinance and local election.

The legislature passed some restraints that went into effect across Texas upon passage. (*E.g.,* Tex. Agric. Code § 143.102), Limitations placed on the roaming of livestock, in general however, through "stock" laws, have also had to pass by a majority vote in the counties that chose to adopt such general restraints. (*See* Tex. Agric. Code §143.021). Likewise, the legislature has passed laws allowing localities to make the same type of determination about the free roaming of dogs. Tex. Health & Safety Code §§822.007, 822.021. Kleberg County, however, has not been shown to have voted to make dog restraint the law. Thus, the common law of free roaming dogs remains in effect in Kleberg County.

Appellant contends that nonetheless, Appellee has a duty to restrain his dog because the dog is "breachy." Although she recognizes at p. 42 of her brief that breachy means "fence-breaking", she equates a dog running free to a "fence

breaker" or "breachy" dog. Many of the cases that discuss "stock laws" or dogs require "breachy" animals to be restrained.

There is however, no evidence of "breachiness," because it does not mean merely "roaming free." In fact, the very case upon which Appellant relies to establish that Appellee had a duty to keep a dog restrained, establishes that it is the animal's fence-breaking *into* another property that gives rise to the duty to confine a "breachy" dog, not the dog's mere roaming freely *off* the owner's property.

In *Phillips v. Crow*, 199 S.W. 851 (Tex. Civ. App.--Amarillo 1917, no writ), the owner of cattle sued for damages or to recover his cattle that he had placed next to Defendant Irby's property. The court, in reversing the ruling for the Plaintiff due to problems with the charge, acknowledged that it was Defendant Irby's duty to construct a sufficient fence to protect against normal animals. (This duty arose from statute. *See* Tex. Agric. Code §143.001; 143.028) The court specifically acknowledged the confusion that arose as a result of talking about negligence, when the fence sufficiency and duties were statutory. *Phillips v. Crow*, 199 S.W. 851, 852 (Tex. Civ. App.--Amarillo 1917, no writ). Crow only had a duty to restrict his cattle if there was a finding that they were "breachy", and if so, he then had to have a sufficient fence as well. That duty arose, however, only if the cattle were fence-breakers such that they got onto other people's property and damaged it. *Phillips*, 199 S.W.2d 851; *McClelland*, 355 S.W. 483, 499.

Breachiness and the obligation to hold an animal in confinement only arises from a tendency of the animal, not to break out of an enclosure, but to break into an enclosure (an enclosure required by statute to protect against free-roaming livestock). *E.g.,* Tex. Agric. Code §§143.001, 143.028, if no stock law is passed.) See also *Jobe v Houston*, 23 S.W. 408, 408 (Tex. Civ. App. 1893, no writ) ("...and that the cattle were breachy, and broke into several farms and pastures in the neighborhood....); *Moore v. Pierson*, 93 S.W. 1007 (Tex. Civ. App. 1906), *aff'd* 100 Tex. 113, 94 S.W. 1132 (Tex. 1906) (cattle owner who drove his cattle to a strip of land and left them there, having no knowledge of his animals being breachy, had no liability to Appellant who did not know how strong his own fence was).

This definition as fence-breaking is also consistent with the *Gibbs/ McClelland/Hayes* quote at pp. 12-13 of this brief that explains that any animal may to run at large unless known to be diseased, vicious or "breachy." The oft-cited phrase for over 100 years, would make no sense if breachy meant merely "wandering free." How can an owner allow all animals to run free except those that run free? That would be the meaning of the clause if "breachy" meant "roaming free." "Breachy" thus cannot mean the same as running at large. Based on Texas history, the statutes, and the case law, it refers to an animal that will break into property, even if the fence meets statutory requirements.

There is absolutely no evidence that this dog broke any fence. The record is devoid of any evidence that this animal broke into an enclosure. And there is certainly no evidence that at the time of this accident, it had broken into any fence around the county road, as there is no evidence of such a fence or of any fence-breaking. Thus, the term "breachy" does not apply to this dog. As such by Texas common law, it is allowed to run freely

VI.
CONCLUSION AND PRAYER

Appellant's search for a duty of restraint when no local law applies fails. From at least the Constitution of 1876, Texas has believed in the right of animal owners to allow their animals to roam freely. Statutes were passed to allow cities and counties to impose such laws. The citizens of Kleberg County have not done so. No such duty exists. If a duty is to be imposed, it should be imposed pursuant to legislative design: by Kleberg County voters. This court should not interfere with that local right to choose.

The court system should not enforce its will on the residents of Kleberg County to create a duty, they have thusfar chosen not to shift. Without that duty there can be no breach. This Court should affirm the judgment from the trial court in all things and assess costs against Appellant.

WHEREFORE, Jose Ochoa prays that upon due consideration of this matter, the arguments, and the law, that this honorable Court of Appeals affirm the judgment of the trial court in its entirety (and at least as to all negligence *per se* allegations) and assess all costs against Appellant.

Respectfully submitted,

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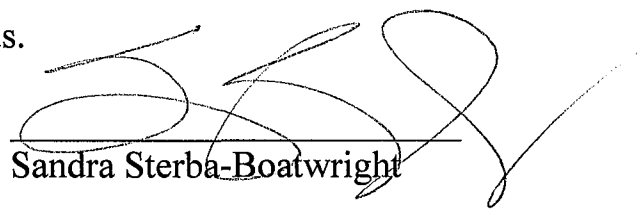

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I hereby certify that a true and correct copy of the above and foregoing pleading has been forwarded by E-filing and Telecopier to the parties listed below on this the 21st day of August 2020.

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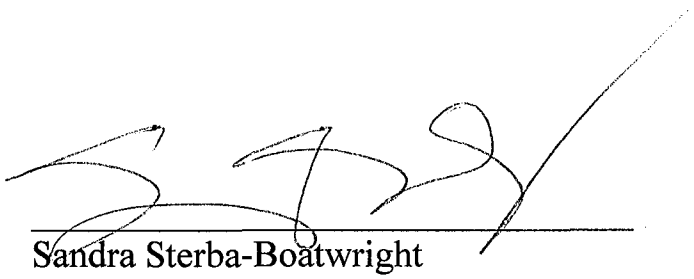

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